No. 99-901

Supreme Court, U.S.
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In the

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER,
Executive Director and Individually,
Respondents.

On Writ of Certiorari to The United States Court of Appeals For the Sixth Circuit

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BRIEF OF NATIONAL WOMEN'S LAW CENTER, *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

(Additional *Amici Listed on Inside Cover)*

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TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE TSSAA IS A STATE ACTOR 4

A. This Court's Criteria for State Action Center on Whether a Party's Actions Are "Fairly Attributable to the State" 4

B. This Court's Decision in *National Collegiate Athletic Ass'n v. Tarkanian* Indicates That A State High School Athletic Association Is a State Actor By Virtue of Its Membership and Governance Structure 5

C. Tennessee's Designation of the TSSAA as the Organization to Govern Secondary School Athletics in the State Further Supports Its Status as a State Actor 10

II. RECOGNIZING STATE ATHLETIC ASSOCIATIONS AS STATE ACTORS IS IMPORTANT TO ENSURING THE GUARANTEE OF EQUAL PROTECTION 13

A. High School Athletic Associations, as State Actors, Must Not Deny Equal Protection 13

B. Participating in Athletics Has Far-Reaching Benefits 16

CONCLUSION 23

APPENDIX A-1

TABLE OF AUTHORITIES

FEDERAL CASES

Adickes v. H. Kress & Co., 398 U.S. 144 (1970) 4

Barnes v. Lehman, 861 F.2d 1383 (5th Cir. 1988) 7

Blum v. Yaretsky, 457 U.S. 991 (1982) 2, 7

Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973) 13, 14

Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 13 F. Supp. 2d 670 (M.D. Tenn. 1998) ... 6, 9, 10, 11

Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) . 4

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 3, 13

Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982) 2, 7, 8, 15

Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 13

Cohen v. Brown Univ., 991 F.2d 888, 891 (1st Cir. 1993) 18, 20

Communities for Equity v. Michigan High Sch. Athletic Ass'n, 80 F. Supp. 2d 729 (W.D. Mich. 2000) 6, 9, 15

Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 735 F. Supp. 753 (M.D. Tenn. 1990) 10, 11

Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) 4

Graham v. Tennessee Secondary Sch. Athletic Assoc., No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995) 11

Griffin High Sch. v. Illinois High Sch. Athletic Ass'n, 822 F.2d 671 (7th Cir. 1987) 7

In Re: United States, ex rel. Missouri State High Sch. Activities Ass'n, 682 F.2d 147 (8th Cir. 1982) 7

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) . 4

Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968) 2, 7, 8, 12, 15

Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) ... 4, 5, 7

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 14

Moreland v. Western Pennsylvania Interscholastic Athletic League, 572 F.2d 121 (3rd Cir. 1978) 7

National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) 16

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) 2, 5, 6, 7, 9

Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963) 7

Rendell-Baker v. Kohn, 457 U.S. 830 (1982), ... 7

STATE CASES

Hass v. South Bend Community Sch. Corp., 259 Ind. 515, 289 N.E.2d 495 (1972) 13

FEDERAL STATUTES

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.* 14

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* 14

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* 14

20 U.S.C. § 1681(a)(5) 14

FEDERAL REGULATIONS

34 C.F.R. § 106.41(b) 14

OTHER AUTHORITIES

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The Women's Sports Foundation Report: Sport and Teen Pregnancy (May 1998) 20

U.S. Census Bureau, *Current Population Survey Report, Table 1: Enrollment Status of the Population 3 Years Old and Older* (Oct. 1998) 21

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations dedicated to the achievement of equality of opportunity for all students without discrimination based on gender, race, national origin, or disability.[1] All of the *amici* have a strong interest in ensuring that the Equal Protection Clause of the Fourteenth Amendment to the Constitution, which mandates that no State shall "deny to any persons within its jurisdiction the equal protection of the laws," is accurately interpreted and applied to high school athletic associations. Statements of interest of the *amici* are set forth in Appendix A.

SUMMARY OF ARGUMENT

1. This case involves a state athletic association's attempt to distance itself from the State, despite the extremely close nexus between the association and the State's public schools and Board of Education, through which the association governs every aspect of interscholastic athletics in the State. By so doing, the athletic association attempts to escape its obligations under the Constitution, including its non-discrimination obligations under the Equal Protection Clause. The question presented requires the Court to decide whether the conduct of the Tennessee Secondary School Athletic Association ("TSSAA" or "Association"), the organization designated by the State to govern interscholastic athletics and consisting entirely of secondary schools located in the State of Tennessee, the majority of which are public, is fairly

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[1] The parties' written consent to the filing of this brief has been filed with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

attributed to the State of Tennessee and thus constitutes "state action."

In *National Collegiate Athletic Ass'n v. Tarkanian*, this Court indicated that state athletic associations whose memberships consist entirely of institutions located within the same state, many of them public institutions, should be considered state actors. 488 U.S. 179, 194 n.13 (1988). By way of explanation, the Court cited with approval two circuit court opinions holding two state high school athletic associations to be state actors: *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), and *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968). Indeed, the vast majority of circuit courts to consider the issue similarly have concluded that state athletic associations such as the TSSAA are state actors based on a variety of factors – factors that exist in this case and that demonstrate a close and intertwined relationship between the athletic association and the State.

As is generally true of state athletic associations, the TSSAA's membership consists mostly of public schools located within the State; its leadership is comprised of public school officials and employees; TSSAA rules and policies are binding on all schools unless they withdraw from the TSSAA; local school districts are primarily responsible for enforcing the TSSAA rules and policies; and its funding comes largely from public school events that are held at state-owned public school facilities. Moreover, Tennessee's State Board of Education has designated the TSSAA as the organization to govern interscholastic athletics in the state. Because of this uniquely close and intertwined relationship between the TSSAA and the State, the actions of the TSSAA are "fairly attributable to the State" and, thus, the TSSAA is a state actor.

2. While in this case the state actor issue arises in the context of a First Amendment challenge, recognizing that state athletic associations are state actors is important to ensuring that high school students are provided equal protection of the laws in interscholastic athletics programs. The Equal Protection Clause of the Fourteenth Amendment to the Constitution mandates that "no State shall 'deny to any persons within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 489 (1985). Unfortunately, the promise of equal protection has yet to be fully realized with respect to female students' opportunities to participate in athletics.

The importance of equality in athletics to the educational achievement, psychological and physical health, and professional opportunities of women and minorities is well documented. Notwithstanding these benefits, discrimination in interscholastic athletics still persists. By recognizing that state athletic associations are state actors, state athletic associations will be held accountable for the rules which govern interscholastic athletics, and thus will not be able to insulate themselves from their non-discrimination obligations, including those contained in the Equal Protection Clause.

ARGUMENT

I. THE TSSAA IS A STATE ACTOR

A. This Court's Criteria for State Action Center on Whether a Party's Actions Are "Fairly Attributable to the State"

The Court has set forth various tests to determine whether a party's challenged conduct should be considered state action: (1) the public function test, which requires that the private entity exercise powers that are traditionally exclusively reserved to the State, such as holding elections, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-64 (1978); (2) the state compulsion test, which requires that a state exercise such coercive power or provide such significant encouragement, either covert or overt, that in law the choice of the private actor must be deemed to be that of the State, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); (3) the symbiotic relationship or nexus test, which requires that there be a sufficiently close nexus between the State and the challenged action of the private party so that the action of the latter may be fairly treated as that of the State itself, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961); and (4) the joint action test, which requires that the private party be willfully and jointly engaged with the State or its agents in the challenged action, *Adickes v. H. Kress & Co.*, 398 U.S. 144, 152 (1970). *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). The Court itself, however, has questioned whether "these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court" in cases raising the issue of when particular conduct may be deemed state action. *Id.* As this Court has stated, these tests essentially stand for the

proposition that a private party's actions constitute "state action" when the party's actions may be "fairly attributable to the State." *Id.* at 937.

As discussed *infra*, the TSSAA's actions are fairly attributable to the State because there is a sufficiently close nexus between the Association and the State of Tennessee. The Association's extremely close nexus to the State is revealed primarily by the fact that the overwhelming majority of its members are public schools that actively participate in the governance of the Association, and additionally by virtue of the State Board of Education's designating TSSAA as the organization to govern interscholastic athletics in the state.

B. This Court's Decision in *National Collegiate Athletic Ass'n v. Tarkanian* Indicates That A State High School Athletic Association Is a State Actor By Virtue of Its Membership and Governance Structure

This Court in *National Collegiate Athletic Ass'n v. Tarkanian* indicated that state high school athletic associations are state actors because of the influence exerted over them by their members, which are predominantly public schools of one particular state. 488 U.S. at 194 n.13. In that case, Tarkanian, a university basketball coach at the University of Nevada, Las Vegas (UNLV), claimed that the NCAA had violated his Fourteenth Amendment due process rights when it recommended that he be disciplined for certain NCAA rule violations. The main issue before the Court was whether UNLV, undoubtedly a state actor, and the NCAA, a nationwide private association of about 1,200 private and public colleges and universities that governs its members' intercollegiate athletics programs, acted jointly to deprive Tarkanian of his rights, thereby transforming the NCAA into

a state actor. *See Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 741-42 (W.D. Mich. 2000) (analyzing *Tarkanian*).

Before reaching this question, however, the Court examined the relationship between UNLV and the NCAA to decide whether UNLV exercised enough control over the NCAA such that the NCAA's conduct in general could be attributed to the State of Nevada. The Court held that the NCAA was not a state actor because the source of the NCAA's legislation is not any one state, but rather its collective membership of public and private colleges and universities from many different states, speaking through an organization that is independent of any particular state. *Tarkanian,* 488 U.S. at 193. The Court made a point of noting, however, that state high school athletic associations would fare differently under this analysis: "The situation would, of course, be different if the membership [of the athletic association] consisted entirely of institutions located within the same state, many of them public institutions created by the same sovereign." *Id.* at 194 n.13.

Footnote 13 in *Tarkanian* provides the framework for analyzing the instant case. The membership of the TSSAA, as is generally true for high school athletic associations throughout the nation, consists entirely of schools located within the same state and the majority of its members are public schools created by the State. *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 673 (M.D. Tenn. 1998) ("[The TSSAA] is composed of 290 public schools and 55 independent and parochial schools."), *rev'd*, 180 F.3d 758 (6th Cir. 1999), *reh'g en banc denied*, 190 F.3d 705 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 1156 (2000). Like the NCAA, the source of the TSSAA's authority is its collective membership, but unlike the NCAA,

all TSSAA members are secondary schools in one state, with the overwhelming majority of them being public schools.

Moreover, in distinguishing state high school athletic associations, the Court in *Tarkanian* cited with approval *Clark v. Arizona Interscholastic Ass'n,* and *Louisiana High School Athletic Ass'n v. St. Augustine High School,* both of which held high school athletic associations to be state actors based on their close nexus to their respective states. 488 U.S. at 194 n. 13. Other circuit courts similarly have held that high school interscholastic athletic associations are state actors. *See Moreland v. Western Pennsylvania Interscholastic Athletic League,* 572 F.2d 121, 125 (3rd Cir. 1978); *Griffin High Sch. v. Illinois High Sch. Athletic Ass'n,* 822 F.2d 671, 674 (7th Cir. 1987); *In Re: United States, ex rel. Missouri State High Sch. Activities Ass'n,* 682 F.2d 147, 151 (8th Cir. 1982); *Oklahoma High Sch. Athletic Ass'n v. Bray,* 321 F.2d 269, 273 (10th Cir. 1963).[2]

The Fifth Circuit in *St. Augustine* and the Ninth Circuit in *Clark* considered numerous factors that demonstrated the extremely close nexus between each high school athletic

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[2] Respondents' contention that only cases decided after the "*Blum* trilogy" are relevant to deciding whether high school athletic associations are state actors fundamentally misunderstands this Court's longstanding criteria for state action. Respondents' Brief in Opposition 6-9. The Court's decisions in *Blum v. Yaretsky*, *Lugar v. Edmonson Oil Co.*, and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), the "*Blum* trilogy," did not articulate new tests for state action. Rather, the Court merely clarified and applied its precedents in deciding whether the private party in each case was a state actor. *See, e.g., Barnes v. Lehman*, 861 F.2d 1383, 1386 (5th Cir. 1988) (noting that *Blum* trilogy applied "the existing incantations [of the state action test] to varying facts"). Thus, while some of the circuit court cases cited above were decided before *Blum,* the outcomes would not be different had they been decided after *Blum.*

association and its respective state and hence its status as a state actor: (1) The association's membership consisted primarily of public schools; (2) The association's leadership was composed of public school employees – state officers who were state-paid and state-supervised – who played a substantial role in determining and enforcing policies and regulations; (3) The association's funds came largely from public athletics events, the great majority of which were held at state-owned and state-supplied facilities; (4) Association employees were covered by the state retirement system; (5) The association exercised wide control over the scheduling, participation in and conduct of public schools' athletic events; (6) The association set and enforced eligibility rules and limited the number of games public schools could play; (7) The association had the power to keep public schools from competing against other schools; (8) The association had the power to investigate, discipline and punish member schools; and (9) The association's rules and regulations bound all public schools. *See Clark*, 695 F.2d at 1128, and *St. Augustine*, 396 F.2d at 227-28.

Almost identical factors are present in this case: (1) The TSSAA consists primarily of public schools and school districts; (2) The leadership of the TSSAA – namely, its Legislative Council and Board of Control – is made up entirely of high school principals, assistant principals, or qualified superintendents, and these state officials play a substantial role in determining and enforcing TSSAA rules and regulations; (3) The majority of TSSAA revenues are derived from membership fees paid by public schools and from gate receipts at public athletic events, the great majority of which are held at state-owned and state-supplied public school facilities; (4) The TSSAA's employees are covered by the state retirement system; (5) The TSSAA exercises wide control over the scheduling, participation in and conduct of public schools' athletic events; (6) The TSSAA sets the

seasons, limits the number of practices and contests between schools and determines and enforces all eligibility rules and contest regulations for interscholastic play; (7) The TSSAA governs which schools its member public schools can compete against; (8) The TSSAA investigates, disciplines and punishes member schools, and (9) TSSAA rules and regulations bind all public schools, although any school may withdraw from the association. *Brentwood*, 13 F. Supp. 2d. at 683-84. In addition, officials for athletic contests at the TSSAA member schools must register with the TSSAA and be selected from the Association's official list. The TSSAA also sets certain restrictions and requirements for its member schools' coaches, who for the most part are public employees, including requiring them to be a member of the regular teaching staff or to register with the TSSAA. The fact that the TSSAA places initial responsibility for ensuring compliance with the Association's rules and regulations upon the principals of the member schools merely highlights the close nexus between the Association and the public school system. *Cf. Communities for Equity v. Michigan State High Sch. Athletic Ass'n*, 80 F. Supp. 2d at 739. All of these factors demonstrate the close nexus between the TSSAA and the State of Tennessee and hence lead to the conclusion that the Association's actions are fairly attributable to the State.[3]

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[3] In *Tarkanian*, after concluding that the NCAA was not a state actor by virtue of the nexus test, the Court went on to consider the alternative test of whether the NCAA's actions were fairly attributable to the State because it acted jointly with UNLV. In this case, the TSSAA satisfies the nexus test by virtue of its membership and governing structure, and hence all of its actions are state action; therefore, it is unnecessary to reach the issue of whether it is a state actor under the joint action test.

C. Tennessee's Designation of the TSSAA as the Organization to Govern Secondary School Athletics in the State Further Supports Its Status as a State Actor

The relationship between the TSSAA and Tennessee's State Board of Education ("the Board") further reveals the close nexus between the Association and the State. As the district court found in this case, the State Board of Education has recognized the functions of the TSSAA in governing interscholastic competition in the public school system since 1925. In fact, the State Board of Education issued a rule in 1972 that designated the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." *Brentwood*, 13 F. Supp. 2d at 680. Under the 1972 rule, the Chairman of the Board designated a person or persons to serve in an ex-officio capacity on the TSSAA Board of Control and Legislative Council. *Id.*

In April 1995, the Board changed its rule (apparently in response to litigation)[4] to state the following: "The State

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[4] The district court found that the 1995 change in the Board's rule appeared to be in response to two cases holding the TSSAA to be a state actor based in part on the wording of the 1972 rule, which designated TSSAA as the organization to govern interscholastic athletics in the State. *Brentwood*, 13 F. Supp. 2d at 681. The two cases discussed by the district court both involved claims of discrimination against the TSSAA. *See Crocker v. Tennessee Secondary Sch. Athletic Assoc.*, 735 F. Supp. 753 (M.D. Tenn. 1990), (disabled student claimed that TSSAA deprived him of rights secured by the Rehabilitation Act and the Education of the

Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." *Id.* at 681. Despite the cosmetic change in the language of the Board's rule, the relationship between the TSSAA and the State did not change in any way after 1995. The Board's new rule still names the TSSAA as the organization that governs interscholastic athletics in the state, and representatives of the state continued to participate in TSSAA meetings in their ex-officio capacities even after the rule change. In fact, the State Board of Education and the State Department of Education continue to be represented on TSSAA's Board of Control and its Legislative Council. Moreover, the formal change in the language of the Board's rule does not reflect any substantive change in even one of the factors demonstrating the intertwined relationship between the Association and the State, discussed above. *Id.* at 681-85. The TSSAA was, and is, a state actor based on its close nexus to the State, which is reflected by the State Board of Education's designating the TSSAA to govern interscholastic athletics in the state and the Board's participation in such governance.

The facts developed in this case overwhelmingly show that the TSSAA has a sufficiently close nexus to the public,

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Handicapped Act), *aff'd*, 908 F.2d 972 (6th Cir. 1990); *Graham v. Tennessee Secondary Sch. Athletic Assoc.*, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995) (students claimed that TSSAA rule deprived them of due process and equal protection under the Fourteenth Amendment, *inter alia*).

state-controlled school system as well as a sufficiently intertwined relationship with the State Board of Education to make the Association a state actor. Therefore, the TSSAA cannot escape constitutional scrutiny by claiming to be a private organization and the State cannot avoid its constitutional obligations by claiming that it is not involved in the regulation of interscholastic athletics. As the Court found in *St. Augustine*:

> The factual context is not of the State's declining to act in an area which is then taken over by a private instrumentality. The State has not withdrawn from supervision and coordination of interscholastic activities as the Association contends. Instead, . . . interscholastic athletics is a program in which the State is actively and intensively involved, and "for the State to devote so much time, energy, and other resources to interscholastic athletics and then to refer coordination of those activities to a separate body cannot obscure the real and pervasive involvement of the State in the total program."

396 F. 2d at 228 (quoting district court decision).

II. RECOGNIZING STATE ATHLETIC ASSOCIATIONS AS STATE ACTORS IS IMPORTANT TO ENSURING THE GUARANTEE OF EQUAL PROTECTION

A. High School Athletic Associations, as State Actors, Must Not Deny Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the Constitution mandates that "no State shall 'deny to any persons within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne,* 473 U.S. at 489. The Court's decision in this case will have significant implications for ensuring that opportunities to participate in interscholastic athletics are provided equally without regard to sex, race or ethnicity. As discussed *infra*, equal opportunity to participate in athletics is extremely important to female and minority students due to the far-reaching educational, sociological, physiological and psychological benefits that result from sports participation.

The policies and practices adopted by state boards of education and public schools to govern interscholastic athletic programs must comply with the Equal Protection Clause. *E.g., Brenden v. Indep. Sch. Dist. 742*, 477 F.2d 1292 (8th Cir. 1973) (school could not prohibit girls from playing on a boys' tennis and cross country teams solely on basis of sex); *Hass v. South Bend Community Sch. Corp.*, 259 Ind. 515, 289 N.E.2d 495 (1972) (schools could not prohibit girls from playing on a boys' golf team solely on basis of sex). In order to promote coordinated and workable systems of state-wide interscholastic athletics, however, States typically designate athletic associations to set contest rules, determine eligibility restrictions, and promulgate uniform

policies and practices that govern nearly every aspect of interscholastic athletics throughout their states.

States should not be able to insulate themselves from their non-discrimination obligations, specifically those contained in the Equal Protection Clause, by trying to distance themselves from state athletic associations. Likewise, high school athletic associations, which for the reasons explained above are state actors, should not be allowed to escape their non-discrimination obligations.[5] Courts repeatedly have ensured that female and minority athletes receive an equal opportunity to participate in athletics by applying the Equal Protection Clause to state athletic associations. In *Brenden v. Indep. Sch. Dist. 742*, two Minnesota high school girls challenged as a violation of the Equal Protection Clause the state athletic association's

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[5] Students may also challenge certain discriminatory practices in interscholastic athletics of covered institutions pursuant to statutory rights contained in Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*; Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000 *et seq.*; and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 *et seq.* These statutory non-discrimination mandates do not supplant the protections provided by the Equal Protection Clause. In fact, these statutory rights and Constitutional rights differ in certain respects. For example, Title IX regulations explicitly exempt "contact sports" from certain non-discrimination requirements. Thus, a public school would not be forced to permit a girl to try out for the boys' basketball team under Title IX, even if the school fields no such team for girls. *See* 34 C.F.R. § 106.41(b). The female basketball player would be able to pursue a discrimination claim under the Equal Protection Clause, however. By way of further example, in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982), this Court held that the University's women-only admission policy violated the Equal Protection Clause, even though the same claim was not allowed under Title IX, because Title IX explicitly exempts schools that "traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex." 20 U.S.C. § 1681(a)(5).

rule prohibiting girls from participating on the boys' tennis and cross-country skiing and running teams, while the association's member schools provided no such teams for girls. The Eighth Circuit held that denying girls an opportunity to participate on a school non-contact sports team solely on the basis of sex was a denial of equal protection of the laws. In *Louisiana High School Athletic Ass'n v. St. Augustine High School*, African American high school students challenged the state athletic association's denial of membership to a high school that maintained a policy of admitting any qualified applicant regardless of race, but whose student body was completely African-American. The Fifth Circuit held that the athletic association violated the students' rights to equal protection by denying membership to a school because of the racial composition of its student body. In *Clark v. Arizona Interscholastic Ass'n*, Arizona high school students challenged a state athletic association rule prohibiting male students from playing on female interscholastic volleyball teams as a violation of the Equal Protection Clause. The Ninth Circuit upheld the athletic association's rule as a permissible means of promoting equality of athletic opportunity between the sexes, which was held to be a constitutionally sufficient justification for the sex-based treatment. Regardless of outcome, however, in all of these cases States were held accountable for the rules by which they govern interscholastic athletics, notwithstanding the States' efforts to distance themselves from the athletic associations, because the state athletic associations were found to be state actors.[6] As discussed

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[6] State athletic associations have made similar efforts to elude their non-discrimination obligations under various civil rights statutes, although this Court has not yet resolved this statutory coverage issue. *E.g., Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 629 (W.D. Mich. 2000) (Michigan High School Athletic Association defended lawsuit alleging discrimination on the basis of sex

below, sports participation is simply too important to the educational, physical, psychological and sociological well being of the nation's children and young adults to deny equality of opportunity to female and minority students.

B. Participating in Athletics Has Far-Reaching Benefits

Sports participation offers much to female and minority students. In 1997, the President's Council on Physical Fitness and Sport released a report on girls' involvement in physical activity and sports. The report confirmed that sports and physical activities are highly beneficial for girls, offering a wide range of educational, sociological, physiological, and psychological benefits. *See The President's Council on Physical Fitness and Sports Report: Physical Activity & Sports in the Lives of Girls* xi-xii (Spring 1997) [hereinafter *President's Council Report*]. Similarly, sports offer many of

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by claiming it was not covered by Title IX or the Equal Protection Clause). Likewise, the NCAA has made similar efforts to escape its non-discrimination obligations under Title IX, as well as other civil rights statutes, by claiming that it is neither a direct nor indirect recipient of federal funds. Contrary to both Petitioner's and Respondents' characterizations of this issue, this Court has explicitly left open the question of whether the NCAA is covered by Title IX, and by analogy Title VI, Section 504 and the Age Discrimination Act. *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999). Although the *Smith* Court rejected the lower court's ruling that the NCAA was covered by Title IX solely because it received dues from its members, which received federal funds, the Court explicitly left open two alternative theories of coverage, including the question of whether, "when a [federal fund] recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient." *Id.* at 469-70. Thus, by rejecting one theory of Title IX liability and at the same time leaving open other grounds for coverage, *Smith* gives the clear impression that the NCAA could well be covered.

these same benefits to minority students. *See* The Women's Sports Foundation, *Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational and Career Mobility of Minority Students* 4-5 (Aug. 15, 1989) [hereinafter *Minorities in Sports*].

First, athletic participation expands academic opportunities and promotes academic achievement. Studies show that student athletes generally have higher grade point averages, better attendance records, and fewer disciplinary problems. *See* National Federation of State High Schools, *The Case for High School Activities* (1999) [hereinafter *Case for High School Activities*]. On average, female athletes fare better academically than their non-athletic counterparts. *See President's Council Report* at xxiii. Young women who participate in sports have higher grades, higher scores on standardized tests, and are more likely to graduate from high school than non-athletes. *See President's Council Report* at xxiv. Athletic participation yields similar benefits for Black and Hispanic students. Minority athletes receive higher grades, are less likely to drop out, score higher on standardized tests, and aspire to hold leadership positions in their communities in greater percentages than their non-athletic counterparts. *See Minorities in Sports* 4-5; Carol Herwig, *Report Stresses Role of Academics; High School Athletes: Winners On, Off Field*, USA Today, Aug. 16, 1989, at 8D (citing *Minorities in Sports)* [hereinafter *Report Stresses Role of Academics*]. Similarly, Hispanic female athletes, especially from rural schools, are more likely than non-athletes not only to improve their academic standing while in high school, but also to graduate and to attend college following high school. *Minorities in Sports* 14.

In addition, the availability of athletic scholarships sharply increases young women's ability to pursue a college education and to choose from a wider range of schools, thus

opening more doors for women. Indeed, for many low-income women, intercollegiate athletics provides a gateway to an education that they otherwise could not obtain. *See, e.g., Cohen v. Brown Univ.*, 991 F.2d 888, 891 (1st Cir. 1993), *aff'd in relevant part,* 101 F.3d 155 (1st Cir. 1996), *cert. denied,* 520 U.S. 1186 (1997). In order to develop the physical skills and obtain the necessary training to successfully obtain an athletic scholarship, however, participation in high school athletics is essential.

Second, sports offer students lifelong lessons, and playing high school sports is a predictor of later success in life. *See Case for High School Activities.* Female and minority athletes are more likely to aspire to hold leadership positions later in life than non-athletes. *See Minorities in Sports* 5; *Report Stresses Role of Academics*. In addition, female athletes develop a range of skills through participation in athletics, all of which are crucial to success in employment and adult life generally. Those skills include the ability to work on a team, to perform under pressure, to set goals, and to take constructive criticism. Participation in interscholastic athletics offers young women "an opportunity to exacuate [sic] leadership skills, learn teamwork, build self-confidence, and perfect self-discipline." *Cohen*, 991 F.2d at 891. Importantly, participation in sports also can teach problem-solving skills. *See President's Council Report* 64.

Third, regular and rigorous physical exercise from sports provide enormous physical and mental health benefits to women and minorities. Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, and other health related problems. *See* Donna A. Lopiano, *Testimony Before the U.S. Subcomm. on Consumer Affairs, Foreign Commerce and Tourism*, Oct. 18, 1995. A 1998 study found that former college athletes had a 35% less chance of developing breast cancer and a 61% less

chance of developing reproductive cancer compared to non-athletes. *See* Carol Krucoff, *Exercise and Breast Cancer,* Saturday Evening Post, Nov. 1995, at 22. Increased fitness levels can contribute to better posture, the reduction of back pain, and the development of physical strength and flexibility. *See President's Council Report* 14. Significantly, if a girl does not participate in sports as a youth, she has a significantly reduced chance of engaging in physical activity as an adult. *See Minorities in Sports* 5 (former athletes were two to eight times more involved with sports during four years after high school than non-athletes).

In terms of emotional and mental health, women who participate in sports have a higher level of self-esteem, a lower incidence of depression, a more positive body image, and greater confidence and pride in their physical and social skills. *See* Debra L. Schultz, *Risk, Resiliency, and Resistance: Current Research on Adolescent Girls* (1991) (citing Colton and Gore, *Gender Differences in Stress and Coping Behaviors Among Late Adolescents).* Through participation in sports, women establish constructive relationships with peers, are influenced by healthy role models, experience success, and learn how to deal with physiological and psychological changes. *See President's Council Report* 64. The same correlation appears to be true for minority female athletes. *See Minorities in Sports* 7.

Sports participation also helps teenagers successfully cope with the physical and mental health challenges and risks associated with adolescence. Teenage female athletes are less than half as likely to get pregnant as female non-athletes (5% and 11%, respectively), more likely to report that they have never had sexual intercourse than female non-athletes (54 % and 41%, respectively), and are more likely to experience their first sexual intercourse later in adolescence than female non-athletes. *The Women's Sports Foundation*

Report: Sport and Teen Pregnancy 2-3 (May 1998). Significantly reduced rates of pregnancy result for African-American and Latina female athletes as well. *Id.* Physical activity appears to decrease the initiation of high-risk health behavior in adolescent girls. According to a 1995 survey of boys and girls ages twelve to sixteen, female adolescents engaging in high levels of leisure-time physical activity are significantly less likely to initiate cigarette smoking than those in moderate and low-leisure time activity groups. Deborah J. Aaron, et al., *Physical Activity and the Initiation of High-Risk Health Behaviors in Adolescents*, 27 Medicine and Science in Sports and Exercise 1639, 1642 (1995). Sports participation also offers teenage girls positive feelings about body image, improved self-esteem, increased self-confidence, and tangible experiences of competency and success. *See President's Council Report* 20-23, 25-26 & 28-30.[7]

Opportunities in athletics are important not only to the athlete, but also to the nation as a whole. When given opportunities, women have made tremendous contributions to the world of sports. Indeed, in 1996, female athletic contributions were acknowledged in the formation of the Women's National Basketball Association, where early reports indicated that viewing and attendance of games exceeded predictions of popularity and interest. *See* American Ass'n of Univ. Women Educ. Found., *Gender Gaps: Where Schools Still Fail Our Children* 78, (Oct. 14,

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[7] A recent book provides a comprehensive look at the impact of sports in the lives of girls and provides a guide for parents who would like to see their daughters succeed. The authors talked with female student-athletes, professional athletes, parents, educators, coaches, and academics. The authors propose that "in raising our athletic daughters, we are raising girls to be strong, self-determined women." Jean Zimmerman and Gil Reavill, *Raising Our Athletic Daughters* xii (1998).

1998) (citing G. Gross, *Girls Gleefully Claim a League of Their Own*, N.Y. Times, Aug. 4, 1997, at A1). And more recently, in July 1999, a record-setting 90,185 fans filled the Rose Bowl and another 40 million Americans watched on television as the United States' women's soccer team won the Women's World Cup. *See*, George Wahl, *Out of this World with the Cup on the Line, A Last-Second Hunch and a Clutch Left Foot Lifted the U.S. to a Breathtaking Victory over China*, Sports Illustrated, July 19, 1999, at 38.

Notwithstanding these tremendous accomplishments and contributions to sport, women and girls still continue to face barriers to equal athletic opportunities. According to the National Federation of State High School Associations, in the 1998-99 school year, female students constituted only 40% of all high school athletes (2.65 million girls, 3.83 million boys), even though total enrollment was approximately 50% female. National Federation of State High School Associations, *1999 High School Athletics Participation Survey*; U.S. Census Bureau, *Current Population Survey Report, Table 1: Enrollment Status of the Population 3 Years Old and Older* (October 1998). In the New York City public school system, for example, 155 of 165 high schools have some girls' sports programs, but 45 of them offer three or fewer sports for girls than for boys, and only about 18,000 of the system's 40,000 student-athletes are girls. Lena Williams, *Progress Is a Slow Train for Girls' Teams,* N.Y. Times, Jan. 14, 1999, at D7. Minority female athletes receive even fewer athletic opportunities. Physical Activity and Health: A Report of the Surgeon General 12, 14 (1996).[8]

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[8] The Surgeon General's Report indicates that nearly half of young people twelve to twenty-one years of age are not vigorously active; moreover, physical activity sharply declines during adolescence. Further, about 14% of young people report no recent vigorous or light-

While full equality of opportunity in athletic participation has yet to be realized, the guarantee of equal protection contained in the Fourteenth Amendment, along with the statutory non-discrimination requirements of Titles IX and VI, have played a vital role in opening up competitive athletics to female and minority student athletes. In order for this commitment to providing young women and minorities equal opportunities in athletics to be sustained, States and their athletic associations must not be permitted to evade their non-discrimination obligations.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the Sixth Circuit's judgment in this case.

Respectfully submitted,

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to-moderate physical activity. This indicator of inactivity is higher among females than males and among black females than white females. *Id.*

APPENDIX

APPENDIX
INTEREST OF THE AMICI

The National Women's Law Center ("Center") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX. In particular, the Center has consistently sought equal opportunities for women with respect to interscholastic and intercollegiate athletics, and was counsel in the first Title IX challenge to discrimination in intercollegiate athletics, *Haffer v. Temple University.* The benefits and opportunities uniquely available to competitive athletes have been and continue to be disproportionately reserved for men. The Center has a deep and abiding interest in assuring equal athletic opportunity, including the opportunity to participate in intercollegiate athletics.

The American Association of University Women (AAUW), an organization of 150,000 members, for well over a century, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues. Current priorities include gender equity in education, reproductive choice, and workplace and civil rights issues.

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center focusing on the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority

areas: Sex Discrimination, including sex discrimination in education; Women's Health and Reproductive Rights; Family Law; Violence Against Women; and Child Care.

Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination and access to equal opportunities in athletic programs and activities. The issues raised in this case will have an enormous impact on the rights of women and girls to participate fully in educational and athletic programs free of the terrible consequences of discrimination. Thus, this case raises questions within the expertise and concern of the California Women's Law Center; and the California Women's Law Center has the requisite interest and expertise to be heard by the Court in this appeal.

Clearinghouse on Women's Issues was established some 25 years ago to provide a channel for dissemination of information on a variety of issues of special concern to women. Advancement of educational opportunities for women and girls and elimination of discrimination in all areas of society are major issues to which we have given sustained attention.

The Connecticut Women's Education and Legal Fund (CWEALF) is a nonprofit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1,000 individuals and organizations. CWEALF has supported a number of cases that promote gender equity in interscholastic athletics.

The Disability Rights Education and Defense Fund, Inc. (DREDF), based in Berkeley, California, is the nation's

premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities.

Girls Incorporated was founded as a national organization in 1945, with the mission of inspiring all girls to be strong, smart and bold. It has expressed its values through a Girls' Bill of Rights that focuses on girls' rights to develop skills for their own success and the community's benefits. For the past two decades, Girls Incorporated has also expressed its values and convictions in policy statements, which form the foundation of their programs and advocacy. Girls Incorporated develops and implements research-based programs that change the world for girls with whom they interact directly.

The National Association for Girls & Women in Sport (NAGWS) consists of professional educators who are committed to fostering quality and equality in sport for girls and women. As part of the American Alliance for Health, Physical Education, Recreation, and Dance, NAGWS operates to provide service to athletes, parents, teachers, coaches, administrators, officials, and researchers. For over 100 years, NAGWS has been addressing the needs of girls and women in sports at all levels of participation, and therefore is very concerned about the issue of whether high school athletic associations are considered to be "state actors."

The National Association for Women in Education (NAWE) is a national professional higher education association dedicated to providing support for women educators through programs, services, publications and advocacy. Founded in

1916, NAWE is one of the oldest and most respected organizations in higher education.

The National Coalition for Sex Equity in Education is an organization of educators and community activits across the United Stated (pre-school through postsecondary) and community activists working to assure equal opportunity in education based on gender.

The National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. Given NCJW's early and active involvement in the passage of Title IX and NCJW's *National Resolutions*, which support "the enactment and enforcement of laws and regulations which protect civil rights and individual liberties for all," we join this brief.

The National Partnership for Women & Families, founded in 1971, formerly the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the United States Supreme Court to advance women's opportunities in education.

The National Organization for Women Foundation (NOW) is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. The NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a contributing membership of over 500,000 women and men in more than 500 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of the NOW Foundation has been to ensure equality and fair treatment for girls and women, particularly equal educational and athletic opportunities in school, and we have advanced legislation and engaged in litigation to that end. Gender equity in interscholastic athletics is important to girls and these programs must be subject to the nondiscrimination requirements of the Constitution.

The NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women and girls equal opportunity, including sex discrimination in interscholastic and intercollegiate athletic programs. For years, NOW LDEF has fought for educational equity for girls and the full enforcement of Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sex discrimination in education programs and joins this case because of its importance to securing equal opportunity in education.

The Northwest Women's Law Center is a nonprofit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the

provision of legal information and referral services. Founded in 1978, the NWLC has been, *inter alia*, dedicated to challenging barriers to sexual equality in education with a focus on eradicating gender discrimination through the enforcement of Title IX, the Constitution, and other antidiscrimination laws. Toward that end, the NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest, and the country, to ensure that women and girls at all educational levels have equal access to educational opportunities. The NWLC is currently litigating several gender equity cases throughout the region that seek to ensure that girls receive equal educational and athletic opportunities, as well as participating with numerous national groups on cases currently before the United States Supreme Court and several federal courts. The NWLC is also working directly with numerous school districts and parent groups to monitor and enforce compliance with these mandates. The NWLC continues to serve as a regional expert and leading advocate on Title IX and gender equity.

Parents for Title IX is a national organization supporting families and others who are helping children achieve gender equity in schools. There is a serious pervasive problem of non-compliance by schools from coast to coast, and it is shameful for schools to continually and deliberately ignore Title IX and other nondiscrimination mandates. We support this effort to achieve equality.

The People for the American Way Foundation ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, equal opportunity and liberty, People For now has over 300,000 members nationwide. People For has represented parties and amici in litigation

before this Court implicating the ability of individuals and groups to vindicate fundamental constitutional and civil rights, including the ability to secure free speech, as well as nondiscrimination, equal protection guarantees against institutions that operate as state actors.

SportsBridge's mission is to empower girls through sports and leadership. Currently, SportsBridge serves multicultural girls, age 11 to 18, who live and attend middle and high schools in under-resourced communities in the San Francisco Bay Area. We promote sports as a vehicle for youth development because playing sports promises short and long-term outcomes that have the potential to exponentially improve girls' lives. SportsBridge strongly supports holding high school athletic associations subject to nondiscrimination mandates.

The Tennessee Lawyers' Association for Women ("TLAW") is a nonprofit professional organization whose purposes include seeking equal protection of the law and promoting equality of opportunity for women. TLAW is concerned that women and minorities will be foreclosed from challenging actions and decisions of the Tennessee Secondary Schools Athletic Association ("TSSAA") on constitutional grounds.

The Title IX Advocacy Project ("the Project") is a youth empowerment and educational/legal advocacy organization that was founded in September 1994 to work with young people and their adult allies to promote gender equity in low-income middle schools and high schools in greater Boston. Currently, the Project focuses on eliminating 1) sexual harassment in school, 2) discrimination against pregnant and parenting students, and 3) gender inequity in school-based athletics programs, all of which violate Title IX, the Constitution, and other nondiscrimination mandates. The Project facilitates workshops at schools, community centers,

and conferences; sponsors peer education programs; provides education and assistance to young people and their families; develops age-appropriate and culturally sensitive gender equity policies for schools; and creates and disseminates resource materials. Our programs provide a co-ed approach to education and empowerment, promote the development of leadership and organizing skills, build self-esteem, increase communication, empathy, understanding and respect between young women and young men, and help to ensure that girls and young women are not deprived of the educational opportunities necessary to fulfill their personal and professional dreams and aspirations.

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm that specializes in precedent setting civil litigation and is dedicated to using trial lawyers' skills and strategies to advance the public good. TLPJ prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. TLPJ has litigated numerous sex discrimination in education cases under the Equal Protection Clause, as well as under Title IX of the Education Amendments Act of 1972. These cases demonstrate TLPJ's longstanding commitment to advancing gender equity in athletics. TLPJ believes that to ensure gender equity in interscholastic athletics, it is critical that high school athletic associations be deemed "state actors" subject to the U.S. Constitution's prohibitions against discrimination.

Wider Opportunities for Women (WOW) is a national nonprofit women's employment organization with over three decades of experience helping women and girls achieve equality of opportunity in education and employment.

WOW's mission is to help low-income women and their children achieve economic self-sufficiency and to move out of poverty. WOW is concerned with ensuring that women have gender equity in all aspects of life, including in interscholastic athletics, because the lack of such equality negatively impacts women's ability to attain economic independence.

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, analyzed equal opportunity policies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that one of the most fundamental guarantees that women and girls are entitled to is equal opportunity, which includes the enjoyment of equal rights and treatment as athletes. Women Employed believes that women are entitled to the same rights and opportunities as men, whether their interests lie in sports, arts, or business.

The Women's Law Project (WLP) is a nonprofit public interest law firm located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP has worked throughout its history to accomplish gender equity in school athletic programs at all levels, from middle school through college. The application of the nondiscrimination clause of the Fourteenth Amendment to entities like state athletic associations that function as state actors in their regulation of public schools' athletic programs is essential to the ultimate elimination of discriminatory practices in these

programs.

The Women's Sports Foundation is a nonprofit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and creating an educated public that supports gender equity in sports. The Foundation distributes over $1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of women in sports.

The YWCA of the U.S.A. is the nation's oldest and largest women's membership movement. Operating out of thousands of locations in all 50 states, the YWCA of the U.S.A. represents approximately 2 million women, girls and their families. Its mission – to empower women and girls and to eliminate racism – is the guiding principle for all YWCA fitness, health, child care, violence prevention, shelter, and social justice programs. The YWCA of the U.S.A. is a founding member of the National Girls and Women in Sports Day organization and worked actively to ensure the passage of Title IX.